F I S C A L I M P A C T R E P O R T

SPONSOR Larranaga **ORIGINAL DATE** 03/04/15 **LAST UPDATED** **HB** 532

SHORT TITLE Whistleblower Protection Posting Requirements **SB**

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		($1,200.0)	($1,200.0)	($2,400.0)	Recurring	Public Liability Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From

General Services Department (GSD)
Public Schools Insurance Authority (PSIA)
Administrative Office of the Courts (AOC)
Attorney General's Office (AGO)
Department of Health (DOH)
State Personnel Office (SPO)
New Mexico State University (NMSU)

SUMMARY

Synopsis of Bill

House Bill 532 amends the Whistleblower Protection Act (WPA) by modifying definitions, adding new requirements for public employee bringing an action against a public employer under the Act, and adjusting the statutory penalties for a violation of the WPA. The significant changes include:

- deleting the definition of good faith and removing that concept as a basis for reporting action or inaction that an employee believes to be unlawful or unethical (Section 2 and Section 3(A));
- deleting officers of a public entity from the definition of public employer (Section 2(B)(4));
- defining retaliatory action to mean an action that results in the suspension, demotion or dismissal of a public employee (Section 2(C);

- defining unlawful or unethical act by an employer to mean a practice, procedure, action or failure to act that violates the Governmental Conduct Act or the Code of Judicial Conduct, in addition to federal law or regulation, state law or administrative rule, or local ordinance (Section 2(D));
- modifying what constitutes whistleblowing to be: (1) communications to the public employer; (2) communications to the media about a public employer's unlawful or unethical action or inaction; or (3) making a report to law enforcement with jurisdiction to investigate the unlawful or unethical act. Anonymous reports are not a communication under the WPA, and a communication of information within an employee's normal job duties does not constitute whistleblowing (Section 3(A)(1) and (B);
- limiting awards of costs and attorneys' fees to when a written settlement offer has been made and rejected and the employee recovers more at trial than that offer (Section 4(A));
- adding language that the ultimate burden is on the public employee to demonstrate that but for the whistleblowing action the employee would not have been dismissed (Section 4(B));
- limiting awards of back pay to the date the action is filed (Section 5(A));
- requiring an employee to exhaust all administrative remedies and grievances before filing an action under the WPA (Section 5(B)); and
- repealing existing law that requires a public employer to post notices setting forth the provisions of the WPA in a conspicuous place on the employer's premises (Section 6).

FISCAL IMPLICATIONS

GSD reports that in assessing WPA claims, each state agency faces significant fiscal challenges in compensating for the WPA's damages provision permitting an award of double back wages. The Public Liability Fund administered by GSD's Risk Management Division (RMD) is responsible for paying for all defense fees and costs, unlimited awards of attorney's fees and other awarded damages provided for in any other law or available under common law. GSD reports that in the four fiscal years prior to enactment of the WPA, the public liability fund paid an average of $ 7,569,753.25 per year for defense and settlement of civil rights claims. In fiscal year 2012, those costs jumped 65 percent to $11,514,885. Those same costs continue to trend upward as more and more WPA claims are asserted, settled and litigated. GSD's estimate of the impact on the Public Liability Fund appears in the operating budget impact table above. PSIA also reports that HB 532 will reduce its liability coverage. DOH, SPO and NMSU also anticipate savings.

SIGNIFICANT ISSUES

NMSU provides this summary in support of HB 532:

> The whistleblower protection statute serves an important purpose, however, the law is currently so broad that it allows almost any public entity employee or independent contractor who suffers any adverse action to bring a vexatious whistleblower claim, since almost every employee will have complained about something prior to the action. Under the current law, many cases brought under more traditional employment related claims now also include a whistleblower claim. The proposed amendments will serve to more appropriately separate claims by individuals who are legitimate whistleblowers who protect the public interest from those vexatious claims brought by disgruntled employees

> and former employees. The consequence will be protection of those who suffer retaliatory action as a result of reporting illegal or unethical conduct, while at the same time minimizing the cost born by the public as a result of specious and ill-founded claims.

According to GSD:

> Enactment of the WPA in 2010 significantly increased the State's financial exposure in all areas of personnel disputes with state employees. This amplified cost burden created by the WPA has often not been commensurate with the legitimacy of the whistleblower accusations levied against employers. Oftentimes, baseless whistleblower claims are lumped on top of or pursued totally independently of the ordinary process of resolving personnel disputes through the State Personnel Board's (SPB) administrative appeals system.
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> While maintaining the integrity of the WPA's original purpose, HB 532 amends the WPA to fairly balance the quality of the whistleblower claims brought against State agencies with the economic burdens that may be statutorily imposed on employers for a WPA violation. Without implementation of the reforms proposed in HB 532, the WPA will continue to encourage meritless lawsuits against the State because of the substantial financial incentives on the part of both the employee and the employee's attorney to bring forth WPA claims, regardless of their merit.

In the same vein, SPO comments may reduce the liability associated with settling and defending claims by employees that were not truly "whistleblowers" (i.e. they were not reporting anything that was actually illegal or "improper" or it was part of their job to report the actions at issue).

DOH provides this analysis of the overall effect of HB 352:

> DOH, like other state agencies, has had to defend itself against claims under the WPA. The proposals in HB532 would provide more concrete standards for claims under the WPA. These proposed changes may limit claims under the WPA so there are fewer claims made against DOH and other state agencies. For instance, the clarification that communication of information within an employee's normal job duties would eliminate litigation on this point.

But AOC advises:

> "[W]histleblower laws in general are meant to encourage employees to report illegal practices without fear of reprisal by their employers." *Janet v. Marshall*, 2013-NMCA-037, ¶ 21, 296 P.3d 1253 (internal citations omitted). The *Marshall* case addressed the definition of "public employer" in the Whistleblower Protection Act and specifically analyzed the term "officer." The Court determined that two employees of the Metropolitan Court were not "officers" as contemplated by the definition of "public employer" under the Whistleblower Protection Act. HB 532 deletes "officers" from the definition of "public employer."

As to the specific amendments contained in HB 532, GSD first provides this comment as to the change in definition of retaliatory action:

> By broadly defining "retaliatory action" as any discriminatory or adverse employment action, the WPA, as presently written, creates potentially limitless exposure to public employers. HB 532 limits a public employer's exposure to only those acts resulting in suspension, demotion or dismissal of the public employee so as to clarify, as well as narrow, the scope of conduct required to trigger a claim under the WPA.

SPO expresses concern that the scope of this new definition may still be too broad if it is construed to include actions such as verbal or written reprimands, negative performance reviews, or other forms of progressive discipline.

However, AOC points out:

> In comparison to the U.S. Equal Employment Opportunity Commission's definition of retaliatory action, Section 2(C) of HB 532 significantly limits the definition of a retaliatory action to an action that results in the suspension, demotion, or dismissal of the public employee. The EEOC defines retaliatory actions as "adverse employment actions." According to the EEOC (http://www.eeoc.gov/laws/types/facts-retal.cfm):
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> > Retaliation occurs when an employer, employment agency, or labor organization takes an adverse action against a covered individual because he or she engaged in a protected activity.
> > Adverse Action: An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:
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> > - employment actions such as termination, refusal to hire, and denial of promotion;
> > - other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance;
> > - any other action such as an assault or unfounded civil or criminal charges that is likely to deter reasonable people from pursuing their rights.

Similar to AOC's comments, AGO advises:

> the proposed amendment to the term "retaliatory action" would narrow the meaning of the term. Under the current Act, retaliatory action can include any "discriminatory or adverse employment action." Furthermore, an adverse employment action has been construed to include more than termination, suspension, or demotion; instead, it can also include other adverse actions taken against an employee such as a decrease in wages or salary, a less distinguished title, loss of benefits, and other employment actions that are materially adverse to the employee's job status. See, e.g. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003) (discussing "adverse action" in the context of a federal Title VII Civil Rights Act retaliation case).

As to what now constitutes whistleblowing in Section 3(A)(1), GSD comments that the WPA, as presently written, only requires as a threshold for bringing a claim an employee's good faith belief regarding an employer's unlawful or improper act; HB 532 requires an employee to have what GSD terms substantial awareness of the alleged unlawful act by the State agency.

However, AOC points out that as so amended, the Act now prohibits public employers from retaliating against employees who communicate information to the public employer, the media, or law enforcement only. It notes, however, that employees in many cases may report unlawful conduct to other government agencies, such as the Internal Revenue Service or the New Mexico Department of Tax and Revenue, the Securities and Exchange Commission, or the New Mexico Environment Department. In order to promote the goal of encouraging employees to report illegal practices, AOC recommends that communications to other government agencies should be covered by the WPA.

The new subsection B in Section 5 requires exhaustion of administrative remedies. As to this change, GSD notes that the WPA, as presently written, places no burden on a public employee to take any action prior to bringing a whistleblower claim. As such, GSD asserts that a public employee is free to pursue litigation at significant cost to the State before first seeking resolution in good faith through offered administrative options; HB 532 requires the employee to first fully exhaust all available administrative remedies and procedures before pursuing a WPA claim. However, AGO comments that it is unclear how this new requirement to exhaust remedies will effect an employee's ability to bring a claim under the WPA, given the two year statute of limitations imposed in existing Section 10-16C-6. Further, AGO expresses concern that the deletion of the non-exclusivity of remedies language in this same section raises a question whether it is intended to preclude any additional remedies that a public employee may be able to pursue under another other law. If that is the intent, this may conflict with other applicable statutes.

GSD provides these other comments in support of the amendments contained in HB 532:

> Excluding contractors from Public Employee Definition: The WPA, as presently written, includes within the definition of "public employee" individuals who contract with a public employer. Given the protections contractors negotiate in agreements with public employers, the element of control a public employer may exert over a contractor is lower than the control it may exert over a public employee. HB 532 eliminates the ability of contractors to bring WPA claims against the State, as the intent of the WPA is to protect the interests of public employees, not private contractors who maintain a statutory remedy under the Fraud Against Taxpayers Act.
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> Improper Acts: Under the current WPA, the types of conduct that might constitute "improper" acts are almost limitless. Vague and broad definitional terms such as "communicates to a third party," "objects to an activity," "provides information to," "abuse of authority," and "danger to the public," can be applied to an employee's factual circumstances too variedly and inconsistently, creating significant wiggle room for creative and illegitimate WPA actions. HB 532 restricts and eliminates these broad definitions.
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> Burden of Proof: The WPA, as presently written, places no burden on a public employee to prove the employer retaliated against the employee because the employee made communications about the public employer's unlawful action. This omission allows claims to be successful without a proper showing of causation – namely that the alleged retaliation was motivated by the public employee's communication. HB 532 imposes a requirement on the employee to prove causation between the retaliation against the employee and the employee's communication.

Limitation on Remedies: Without providing for some limits as to time, or reasonable amounts for compensation, the current WPA threatens public employers with broad exposure as to litigation costs and attorney's fees. HB 532 inserts language into the WPA promoting the use of offers of settlement to bar employees from collecting litigation costs or attorney's fees if they accrued after the public employer's offer of settlement was equal to or greater than the ultimate award.

TECHNICAL ISSUES

To be consistent with the changes in Section 3 (A), it may be appropriate to add the phrase "or unlawful or unethical failure to act" following the word "act" at the end of line 16 on page 3.

MD/bb